SIMETECH (M) SDN. BHD.

v.

YEOH CHENG LIAM CONSTRUCTION SDN. BHD.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[SUIT NO 24-149-87]
18 OCTOBER 1991

CIVIL PROCEDURE: *Summary judgment - Subsequent amendment to the writ and statement of claim - Relating back principle. At the filing date of the writ - Amount owed not properly certified by Architect - Additional claim for sum whether seperate cause of action. Contract further issue - Based on sub-contract clause - Rights of the defendant to claim for losses suffered. Whether SAR wrong in directing payment for interest - When there is no such proviso under the sub-contract.*

This is an appeal of the defendant against the order of SAR dated 7 August 1989.

The subject matter of the case is well known. On 18 February 1987, when the plaintiff instituted the present action it was claiming for a sum of RM48,618.40 being the amount certified by the architect prior to that date. Subsequently, the architect issued two Certificates of payment - Certifying that a further sum of RM173,659.25 was due to the plaintiff. It is also common place that the defendant would be bound to make payments to the plaintiff within 14 days after receipt of any Certificates issued by the architect certifying that such payments were due and payable to the defendant.

The application of the plaintiff for summary judgment pursuant to O. 14 of the Rules of the High Court was heard by the SAR on 24 July 1989, who gave decision in favour of the plaintiff and directing the defendant to pay to the plaintiff the sum of RM222,277.65 together with interest thereon at 12% per annum from 31 March 1986, to date of realisation and costs of RM350. Thereafter the defendant filed its notice of appeal to Judge in chambers dated 9 August 1989, appealing against the decision of the SAR.

It is to be borne in mind, that the general principle that any subsequent amendments to the writ and statement of claim would relate back to or speak from the original date when such writ and statement of claim were filed.

In the circumstances, the matter before the Court was the issue - Whether the plaintiff could claim for the additional sum of RM173,659.25 when at the time when the plaintiff's writ and statement of claim were filed on 18 February 1987, the architect had not yet issued the two Certificates of payment Nos. ST/10 and ST/11.

It was also submitted that, the plaintiff was not entitled to claim the additional sum not withstanding that the writ and statement of claim were amended because as at on the filing date of the writ and statement of claim, the architect had not yet issued the two Certificates of payments.

It was also contended that the plaintiff should institute a seperate action to claim for the additional sum since the claim for the additional sum was a new cause of action based on the said architect's Certificates issued subsequent to 18 February 1987, which the defendant was not contractually bound to pay at the time when the present action was instituted.

Another issue raised was that the SAR was wrong in directing the defendant to pay interest at 12% per annum as from 31 March 1986, as there was no provision under the sub-contract requiring the defendant to pay interest for late payment in respect of any interim progressive payment.

The amendments to the statement of claim made by the plaintiff were done with consent of the parties.

Held:

[1] It is an accepted rule of law that where the amendment will still leave the plaintiff without any title to sue at the date of the writ, the amendment would be worthless.

[2] Pursuant to this rule Counsel for the defendant has every right to raise the first issue namely; whether, not withstanding the amendment, the plaintiff was entitled to claim for the additional sum when at the date of the issue of the writ the plaintiff was not entitled to such claim.

[3] Applying the principle of "relating back", there is no doubt in my mind that the plaintiff is not entitled to claim the additional sum of RM173,659.25 which became due and payable to the plaintiff only after the date of the issue of the writ and statement of claim.

[4] The cause of action in respect of the claim for the additional sum accrued to the plaintiff after the issue of the writ and statement of claim on 18 February 1987.

[5] Upon careful scrutiny of the provisions of the said Clause 11(g) I am not satisfied that the said statement could be accepted as such a Certificate under the said clause because in order to be such a Certificate the architect must certify the amount of the final payment due to the plaintiff and not just a final adjusted contract sum. Furthermore in order to qualify for payment under a final payment Certificate under the said Clause 11(g) the plaintiff must give an undertaking of indemnity and security against all latent defects in the sub-contract works and there is no evidence that the plaintiff in the present case had given any such undertaking.

[6] The right of the defendant to claim for losses suffered by it in respect of defective sub-contract works is also reserved under Clause 9(b) of the sub-contract. The right of a main contractor to withhold certain sum to satisfy the main contractor's claim against the sub-contractor is also acknowledged under the common law.

[7] In answer to the defendant's claim for the sum in respect of power consumed by the plaintiff, the answer was that the matter was in no way involved with nor could it be raised in the present action of the plaintiff. To my view the answers given by the plaintiff only go to show that the defendant has succeeded in raising triable issues which cannot be resolved at the O.14 judgment stage. The issues can only be resolved at the trial of this action.

[Appeal of the defendant allowed with costs and the order of the SAR revoked.]

Cases referred to:

Eshelby v. Federated European Bank Ltd. [1932] 1 KB 254 ***(foll)***
Tikon Ltd. v. Land & Real Estate Investments Ltd. [1987] 1 All ER 615 ***(cons)***
Sio Koon Lin & Anor. v. S.B. Mehra [1981] 1 MLJ 225 ***(foll)***
Zea Star v. Paslay Augustsson [1984] Vol 2 Lloyd's 605 ***(dist)***
Tottenham Local Board of Health v. The Lea Conservancy Board [1885] 2 TLR 410 ***(cons)***
Gilbert-Ash Ltd. v. Modern Engineering [1973] 3 All ER 195 ***(foll)***

Legislation referred to:

Civil Law Act 1956, s. 11
Rules of the High Court 1980, O. 14, O. 20 r. 3(1)

Other source referred:
English Supreme Court Practice 1985 Vol. 1 Para 20/5 - 8/2 PP 338-339

For the plaintiff - J. Kannaperan; M/s. Shearn Delamore & Co.
For the defendant - C.S. Loy; M/s. Nahappan Dorairaj & Danker

JUDGMENT

Lim Beng Choon J:

On 18 February 1987, the plaintiff instituted this action against the defendant claiming a sum of RM48,618.40. The plaintiff alleged in the statement of claim endorsed in its writ that the defendant was the main contractor for the construction of an office building for Kian Min Realty Sdn. Bhd. (the project). Pursuant to an agreement dated 6 November 1984, the plaintiff agreed to execute the sub-contract works (sub-contract) *viz.* the supply and installation of air-conditioning and ventilation system for a consideration of RM1,288,000 or such other sums as would be due under the sub-contract. The plaintiff asserted that it had since completed the said works satisfactorily but the defendant had failed to pay the plaintiff the outstanding amount of RM48,618.40 being the amount due to the plaintiff under the sub-contract. The plaintiff gave the following particulars to show the amount due to it:

Amount certified for payment	...	RM1,273,000
Less:		
Retention sum -	RM 32,200.00	
Payments of -	RM1,187,937.30	
Agreed debit notes -	RM 4,244.30	
Sub-total		RM1,192,181.60
	Amount due	RM 48,618.60

The plaintiff went on to allege that despite repeated demands the defendant had failed refused and/or neglected to pay the sum claimed. The plaintiff therefore prayed for judgment:

(a) in the sum of RM48,618.40

(b) interest on the sum claimed @ 12% per annum from 31 March 1986

(c) costs.

The defendant entered an appearance on 11 March 1987, but before the defendant had filed in its statement of defence the plaintiff amended its statement of claim on 15 July 1987, pursuant to O. 20 r. 3(1) of the Rules of the High Court (RHC). The amendment related to the particulars showing the amount due to the plaintiff which after the amendment now reads:

Amount certified for payment ..		RM1,414,459.25
Less:		
Payments of -	RM1,187,937.30	
Agreed debit - notes	RM 4,244.30	
Sub-total		RM1,192,181.60
	Amount due	RM 222,277.65

Thereafter the plaintiff filed a summon-in-chambers dated 14 July 1987, which was received and registered by the Court on 16 July 1987, by which it applied for an order pursuant to O. 14 of the RHC to enter final judgment against the defendant for the sum of RM222,277.65 with interest and costs. The application was supported by an affidavit affirmed by Ng Mong Eng (Ng) the general manager of the plaintiff on 14 July 1987, in which the defendant asserted that the plaintiff was duly and justly indebted to the plaintiff in the sum of RM222,277.65 and interest and cost. Ng produced a copy of the sub-contract which he marked it as Exh. 'NME1' in his affidavit. He further asserted that the defendant had satisfactorily completed its sub-contract works and all items on the defect list had been satisfactorily cleared as could be evidenced by the letter dated 20 March 1987, from Juaraconsult Sdn. Bhd. who were the consulting engineers to the project. A copy of the said letter was produced by Ng and marked as Exh. 'NME2' in his affidavit. The statement of the final account had also been finalised as evidenced by the document dated 10 November 1986, a copy of which was annexed as Exh. "NME3" in his affidavit. It is appropriate at this juncture to reproduce so much of the contents of the said Exhibits "NME1", "NME2" and "NME3" as are relevant in my consideration of the issue that was raised before me at the hearing of the appeal lodged by the defendant (encl. 15).

The clauses in the sub-contract Exh. "NME2" that are relevant to the issue raised at the hearing of the defendant's appeal are as follows:

> Clause 11(b)
>
> Within fourteen days of the receipt by the contractor of any Certificate or duplicate copy thereof from the architect the contractor shall notify and pay to the sub-contractor the total value certified therein in respect of the sub-contract works and in respect of any authorised variations thereof or in respect of any amounts ascertained under Clause 8(c) thereof less:
>
> (i) Retention money, that is to say the proportion attributable to the sub-contract works of the amount retained by the employer in accordance with the main contract; and
>
> (ii) The amount previously paid.
>
> (g) If before the issue of a final Certificate under the main contract the architect desires to secure final payment to the sub-contractor on completion of the sub-contract works and in accordance with and subject to the provisions of the main contract relating to prime cost sums issues a Certificate to the contractor including an amount to cover such final payment, then the contractor shall pay to the sub-contractor the amount so certified by the architect as aforesaid; but such payment shall only be made if the sub-contractor indemnifies and secures the contractor to the reasonable satisfaction of the contractor against all latent defects in the sub-contract works and if by such final payment the contractor will be discharged under the main contract from all liabilities in respect of the sub-contract works except for latent defects.

The Certificate of the consulting engineer dated 20 March 1987, Exh. "NME2" started off with a statement that a final inspection of the M & E works made under the scope of contract, that is:

(1) L.T. Electrical Installation

(2) Air-Conditioning & Ventilation Installation

(3) Fire Fighting Services & P.A. System Installation

(4) Lifts Installation and

(5) Plumbing and Sanitary Installation had been carried out on 18 March 1987, in the presence of certain representatives of all parties concerned and the Certificate went on to say:

> All the items on the defect list for inspection on abovementioned M & E Services, carried on 4, 5 and 6 February 1986, at the handover of the building have now been satisfactorily cleared.

Exh. "NME2" was sent to the architect of the project with copies to the plaintiff and the defendant.

Exh. "NME3" was issued by the consulting engineer on 10 November 1986 and the relevant part of the statement reads as follows:

> Statement of final account
>
> ....
>
> Airconditioning & Ventilation Installation
>
> Sub-Contractor: M/s. Simetech (Malaysia) Sdn. Bhd.
>
> Awarded contract sum: RM1,288,000.

The consulting engineer then proceeded with the deduction of the total costs of omitted sub-contract works and to add in the costs of additional sub-contract works with the following result:

> Final adjusted contract sum: RM1,414,459.25.

The final adjustment was followed by the following statement:

> We confirm the above record is correct and there will be no further claim of the variation work.

The statement was confirmed by the authorised representative of the plaintiff who signed in the space provided and endorsed with the plaintiff company's chop. It was signed on 30 October 1986. Exh. "NME3" was sent to the architect of the project with copies to the plaintiff and the defendant.

The plaintiff based its claim for summary judgment on these three documents. As the final adjusted contract sum came to RM1,414,459.25 and as the defendant had only made progressive payments and payments by debit notes amounting to RM1,192,181.60, the plaintiff therefore wanted summary judgment for the balance sum of RM222,277.65 with interest and costs.

The defendant through its Contracts Manager, Edward Lee Hock Soon filed in an affidavit affirmed by Edward Lee on 5 October 1987, in which it was asserted that the last Certificate issued by the architect to the defendant prior to the date of the filing of the statement of claim by the plaintiff was dated 11 March 1987, which was progress payment No. 21. He produced the said Certificate comprising of seven separate statements of accounts of all the sub-contractors including the defendant which Edward Lee marked as Exhs. "LHS 1A" to "LHS 1G". From Exh. "LHS 1G" it was clearly shown, so asserted Edward Lee, that he certified gross figure in the Certificate was RM1,273,000 less the retention sum of RM32,200 the net amount certified was RM1,240,800. As the plaintiff had acknowledged receipt of the sum of RM1,187,937.30 and had further agreed to debit notes amounting to RM4,244.30, the amount in dispute was only RM48,618.40. Edward Lee went on to allege that the plaintiff was not even entitled to that sum for there were two debit notes dated 24 June 1985 and 23 August

1985, amounting to a sum of RM2500 each being reimbursement cost of usage of the defendant's passenger hoist. There was a further debit note dated 31 March 1986, amounting to RM43,618.40 being reimbursement for loss and expense due to delay caused by the defendant from 25 August 1985 to 29 January 1986.

Approximately 9 months after Edward Lee had affirmed the aforesaid affidavit, one Robert Lazar of the firm of Shearn Delamore & Co. and Drew & Napier solicitors of the plaintiff affirmed an affidavit on 16 July 1988, in which he produced copies of the Architect's Certificate No. M60/ST10 dated 20 July 1987 (Certificate ST10) and Certificate No. M60/ST11 dated 8 September 1987 (Certificate ST11). Presumably Robert Lazar was given these 2 Certificates by the plaintiff on or about the date he affirmed his affidavit. The 2 Certificates were produced and annexed in Exh. "RL1" to the affidavit. Certificate ST10 certified a further gross sum of RM141,459.25 while Certificate ST11 certified a further gross sum of RM32,000 due to the plaintiff. Upon filing the 2 Certificates, the plaintiff thereafter applied on 1 November 1988 to amend its statement of claim one more time. By consent the amendments were allowed resulting in the claim of the plaintiff being increased to RM222,277.65 particulars of which as stated in its re-amended statement of claim are as follows:

Amount previously certified for payment	...	RM1,273,000.00
Less retention sum		32,200.00
		RM1,240,800.00
Amount due under Certificate No 60/ST/10	- RM141,459.25	
Amount due under Certificate No 60/ST/11	- RM 32,200.00	
	Sub-total	RM 173,659.25
Less:		RM1,414,459.25
Payments of -	RM1,187,937.30	
Agreed debit note -	RM 4,244.30	
	Sub-total	RM1,192,181.60
	Amount due	RM 222,277.65

The plaintiff averred that Certificates ST10 and ST11 were matters arising since the issue of the writ.

Thereafter Edward Lee affirmed a further affidavit on 10 January 1989, in which he produced a debit note for the sum of RM28,624 being interest on retention fund incurred due to delay by the plaintiff in making good its defect in works from 29 January 1987. He also alleged that the defendant was entitled to withhold a sum of RM125,029.28 in respect of power consumed by the plaintiff.

In response to the allegations of the defendant made in the two affidavits of Edward Lee, the plaintiff through its general manager, Ng Mong Eng affirmed another affidavit on 21 June 1989 in which it was asserted *inter alia* that the plaintiff had at all times acted expeditiously and was instead often hampered in its progress of the installation and commissioning of the air-conditioning because of the defendants and other sub-contractors. Therefore the defendant was not entitled to refuse to return the retention sum of RM32,000 that was due to the plaintiff or to charge the plaintiff a sum of RM43,618.40 purportedly to be reimbursed for loss and

expense due to delay caused by the plaintiff from 28 August 1985 to 29 January 1986. It was also asserted that the defendant's claim for the further sum in respect of the alleged plaintiff's consumption of power was arbitrarily raised by the defendant to avoid liability.

The application of the plaintiff for summary judgment pursuant to O. 14 of the RHC was heard by the SAR on 24 July 1989, who delivered her decision on 7 August 1989, in favour of the plaintiff and directing and defendant to pay to the plaintiff the sum of RM222,277.65 together with interest thereon at 12% per annum from 31 March 1986 to date of realisation and costs of RM350. Thereafter the defendant filed its notice of appeal to Judge in chambers dated 9 August 1989, appealing against the decision of the SAR.

It is common place that on 18 February 1987, when the plaintiff instituted the present action it was claiming for a sum of RM48,618.40 being the amount certified by the architect prior to that date. However subsequently as stated earlier the architect issued two Certificates of payment No. 60/ST/10 and ST/11 certifying that a further sum of RM173,659.25 was due to the plaintiff. It is also common place that the defendant would be bound to make payments to the plaintiff within 14 days after receipt of any Certificates issued by the architect certifying that such payments were due and payable to the defendant. Bearing in mind the general principle that any subsequent amendments to the writ and statement of claim would relate back to or speak from the original date when such writ and statement of claim were filed, the issue raised by Counsel for the defendant is whether the plaintiff could claim for the additional sum of RM173,659.25 when at the time when the plaintiff's writ and statement of claim were filed on 18 February 1987, the architect had not yet issued the two Certificates of payment Nos. ST/10 and ST/11. Counsel for the defendant submitted that the plaintiff was not entitled to claim the additional sum notwithstanding that the writ and statement of claim were amended because as at 18 February 1987, the architect had not yet issued the two Certificates of payment No. ST/10 and ST/11. The plaintiff should institute a separate action to claim for the additional sum since the claim for the additional sum was a new cause of action based on the said two Certificates issued subsequent to 18 February 1987, which the defendant was not contractually bound to pay at the time when the present action was instituted. Another issue raised by Counsel for the defendant was that the SAR was wrong in directing the defendant to pay interest at 12% per annum as from 31 March 1986, as there was no provision under the sub-contract requiring the defendant to pay interest for late payment in respect of any interim progressive payment.

Counsel for the plaintiff on the other hand, submitted that the plaintiff was entitled to claim for the additional sum since the said Certificates were merely certifying payments for works which had been completed as early as 10 November 1986. In any case the plaintiff had a cause of action in its claim for RM48,618 and any subsequent increment to that sum could be duly inserted in the writ and statement of claim by amendment of the same. As to the question of interest Counsel conceded that the SAR was wrong in allowing the 12% per annum interest effective from 31 March 1986. However Counsel then argued that pursuant to s. 11 of the Civil Law Act 1956, the Court could give interest from the date when the cause of action accrued until the date of judgment.

It is to be noted that the amendments made by the plaintiff to its statement of claim were made by consent of the parties. However that may be, it does not inhibit the defendant to raise the issue that notwithstanding the amendments the plaintiff had no right to claim for the additional sum of RM173,659.25 for the abovementioned reasons given by Counsel for the defendant. It is an accepted rule of law that where the amendment will still leave the plaintiff without any title to sue **at the date of the writ,** the amendment would be worthless.

Pursuant to this rule Counsel for the defendant has every right to raise the first issue namely whether, notwithstanding the amendment, the plaintiff was entitled to claim for the additional sum when at the date of the issue of the writ the plaintiff was not entitled to such claim. Putting it another way had the plaintiff a cause of action in respect of the additional sum at the time when the writ was issued?

In considering the first issue, I would refer to the *English Supreme Court Practice 1985*, Vol. 1, para. 20/5 - 8/2 pp. 338-339. There it is set out that:

> An amendment duly made ... takes effect **not** from the date when the amendment is made but from the date of the **original** document which it amends ... Thus when an amendment is made to the writ, the amendment dates back to the date of the original issue of the writ and the action continues on though the amendment **had been inserted from the beginning.** The writ as amended becomes **the origin of the action** and the claim thereon indorsed is **substituted** for the claim originally indorsed. (Emphasis supplied)

The aforesaid proposition finds support in a number of English judgments. Thus in *Eshelby v. Federated European Bank Ltd.* [1932] 1 KB 254 the plaintiff there issued his writ claiming payment of one instalment of money under a particular contract. After the issue of the writ, the defendant defaulted in paying a further instalment under the same contract. The plaintiff sought to amend his pleading to claim in the same action the second instalment also. It was held that he could not do so. The non-payment of the second instalment was a separate cause of action which did not exist at the time when the writ was issued and would therefore have to be claimed in a separate action. Another interesting case is *Tikon Ltd. v. Land & Real Estate Investments Ltd.* [1987] 1 All ER 615. There the plaintiffs entered into a 15-year contract with the defendants for the supply of a stipulated annual quota of clay suitable for the manufacture of facing bricks. The plaintiff rejected the first delivery of clay asserting that it did not satisfy the contractual requirements on the quality and they issued a writ seeking a declaration that they were only required to accept clay of a particular quality. The defendants counterclaimed for the amount agreed to be paid under the contract for the first delivery. Subsequently the defendants applied to amend their counterclaim to plead that the plaintiff had repudiated the contract by their wrongful refusal to accept the first delivery and that the defendants had accepted the repudiation and claimed not only for the amount due under the first delivery but also for loss and damage in that they had been deprived of the opportunity of profiting from the sales of the said clay. The Court of Appeal accepted the principle that as an amendment related back to the date of the original pleading no new cause of action accruing since the original pleading would be allowed. Accordingly an amendment to a counterclaim adding a new cause of action accruing since the date of the counterclaim would not be permitted. However that may be, the Court of Appeal gave judgment in favour of the defendant on the ground that the assertion that the plaintiffs had repudiated the contract was **not a new cause of action** since the facts giving rise to the claim had occurred before the issue of the counterclaim. Furthermore the defendants' election to treat the contract as being repudiated was a result of those facts and went to the issue of remedy rather than constituting a fresh fact necessary to complete a new cause of action. Our then Federal Court adopted a similar approach as enunciated in the *Eshelby* case *(supra)* regarding the question of the non-existence of certain facts at the date of the issue of a writ which could not form part of the cause of action relied on by the plaintiff in his pleadings. Thus in the case of *Sio Koon Lin & Anor. v. SB Mehra* [1981] 1 MLJ 225 the respondent there had contributed RM100,000 to a partnership business with the appellant. Subsequently it was mutually agreed *inter alia* that the respondent would assign all his rights in the partnership to the 1st appellant in consideration of the return of the capital contribution of

RM100,000. A sum of RM15,000 was paid on the execution leaving RM85,000 to be paid by future instalments. RM35,000 was to be paid on or before 12 October 1972 and the balance of RM50,000 was to be paid by monthly instalments of RM10,000 on the 12th of each succeeding month. There was no provision that in the event of default in the payment of any one instalment, the remaining instalments could become immediately due and payable. On 7 October 1972, the respondent took out a writ claiming *inter alia* payment of the sum of RM85,000 with interest. This writ was subsequently amended on 14 October 1972 and a new prayer was added for the payment of any sum found due on the taking of accounts. The learned trial Judge gave judgment for the respondent and the appellants appealed to the Federal Court. In allowing the appeal Chang Min Tat FJ said at p. 226:

> If as at 7 October, the respondent had no right of action to claim for the RM35,000 it is clear that any amendment would be to introduce a new cause of action which did not exist at the date of the writ and if the leave of the Court is necessary, it would be refused: *Eshelby v. Federated European Bank* [1932] 1 KB 254. But as noted, the amendment was made without any requirement for leave and before delivery of the statement of defence. A subsequent application by the appellants to strike out the amendment on the ground that no leave was given for it was, after argument in open Court, dismissed. With this order of Court, the pleadings must be read as amended. If the effect of the amendment was to determine the cause of action as at the date of the amendment, that is, on 14 October 1972, the respondent would be clearly entitled to RM35,000 an instalment due and owing. And if not, but the cause of action was to be determined at the date of the writ, then he would not be. On the authority of *Sneade v. Wotherton & Co.* [1904] 1 KB 295 in which Collins MR held at p. 297:
>
> > the writ as amended becomes the origin of the action and the claim thereon indorsed is substituted for the claim originally indorsed:
> >
> > the amendment dated back to the date of the original issue of the writ and the action continued as though the amendment had been inserted from the beginning.
>
> It follows that the High Court erred in ruling that the respondent had on 7 October 1972, any cause of action in respect of the RM85,000 or any part thereof. We come to this conclusion because authority compels us but with considerable sympathy for the respondent. What he should have done of course was to start another action or actions for the instalments as and when they fell due for payment but remained unpaid. This he cannot now do since in the considerable time that had elapsed before the conclusion of the case was reached in the High Court, the claim of the respondent for the RM85,000 which he had contributed from his own pocket is now statute-barred.

Counsel for the plaintiff drew my attention to the case of *Zea Star v. Paslay Augustsson* [1984] Vol. 2 Lloyd's 605. There the only question posed to the Admiralty Court of the QBD was whether the statement of claim could be amended so as to include a cause of action which had not accrued to the plaintiff on the date when the writ was issued. In giving an affirmative answer to the question the learned trial Judge of the Admiralty Court did not say that the "relation back" theory as laid down in *The Tottenham Local Board of Health v. The Lea Conservancy Board* [1885] 2 TLR 410 and followed by the *Eshelby* case *(supra*) was wrong. Indeed the learned trial Judge conceded that:

> There will be many cases in which it would be inappropriate to give leave to amend a writ or a statement of claim by addition of a new cause of action because of the prejudice which would thereby be caused to the defendant.

However he chose to base his decision purely on procedural ground and common sense. Thus he said at pp. 607-608:

I can find nothing in the rules of Supreme Court which prevents me from giving effect to which I regard as the common sense of the matter.

In any event the judgment in the *Zea Star* case is not binding on me and is contrary to the principle laid down by our then Federal Court in *Sio Koon Lim* case (*supra*) which I am bound to follow.

Applying the principle of "relating back" as enunciated by the cases I cited above to the present case, there is no doubt in my mind that the plaintiff is not entitled to claim the additional sum of RM173,659.25 which became due and payable to the plaintiff only after the date of the issue of the writ and statement of claim. Bearing in mind that the plaintiff was entitled to be paid within 14 days of the receipt by the defendant of any Certificate from the architect pursuant to Clause 11(b) of the sub-contract and that the Certificates Nos. ST10 and ST11 certified payment of the additional were issued by the architect on 20 July 1987 and 8 September 1987 respectively, I have no doubt that the cause of action in respect of the claim for the additional sum accrued to the plaintiff after the issue of the writ and statement of claim on 18 February 1987.

In arriving at the aforesaid conclusion I have not overlooked the fact that the architect had issued what he called as a statement of final account on 30 October 1986. (see Exh. "NME3" annexed to the affidavit of Ng Mong Eng, the General Manager of the plaintiff affirmed on 14 July 1987). At the first glance this statement might appear to be a Certificate issued by the architect pursuant to Clause 11(g) of the sub-contract the provisions of which I have reproduced above. Upon careful scrutiny of the provisions of the said Clause 11(g) I am not satisfied that the said statement could be accepted as such a Certificate under the said clause because in order to be such a Certificate the architect must certify the amount of the final payment due to the plaintiff and not just a final adjusted contract sum. Furthermore in order to qualify for payment under a final payment Certificate under the said Clause 11(g) the plaintiff must give an undertaking of indemnity and security against all latent defects in the sub-contract works and there is no evidence that the plaintiff in the present case had given any such undertaking.

The matter, however, does not end here for notwithstanding my finding that the plaintiff is not entitled to claim for the additional sum of RM173,659.25 for the reasons as stated above the next question that follows is whether it is entitled to the sum of RM48,618 which was the sum originally claimed by the plaintiff pursuant to O. 14 of the Rules of the High Court 1980. Although Counsel acting for the respective parties did not in their submissions direct their mind to this issue nevertheless upon a casual reading of the allegations and counter allegations contained in the respective affidavits of the representatives of the parties the claim for the sum of RM48,618 is vehemently contested. I cannot ignore this highly contested issue.

According to Edward Lee, the Contracts Manager of the defendant, the amount in dispute was no doubt RM48,618.40 but the defendant had a claim against the plaintiff for:

(a) debit note No. 06022/85 dated 24 June 1985, amounting to RM2500.

(b) debit note No. 08014/85 dated 23 August 1985 amounting to another sum of RM2500.

(c) a debit note dated 31 March 1986, amounting to RM43,618.40 being reimbursement for loss and expense due to delay caused by the defendant from 25 August 1985 to 29 January 1986 (see Exhs. "LHS2", "LHS3","LHS4" and "LHS5" annexed to the affidavit of Edward Lee affirmed on 5 October 1987, encl. 7).

In the further affidavit of the same Edward Lee affirmed on 10 January 1989, (encl. 13) it was further asserted that it was only on 29 July 1987, that the plaintiff made good the defects outstanding and the final payment Certificate and debit note showed that the defendant had a further claim in the sum of RM28,624.40 against the plaintiff - see Exh. "LHS13" annexed to encl. 13. The defendant had still a further claim for the sum of RM125,029.28 in respect of power consumed by the plaintiff whilst testing and commissioning of the plaintiff's air-conditioning and ventilation works since the charges for testing and commissioning was at all material times to the account of the plaintiff. The right of the defendant to all the aforementioned claims is reserved under Clauses 3 (b) (i) (ii) and (iii) of the sub-contract which reads:

3. The Sub-Contract shall:

(a) ...

(b) indemnify and save harmless the contractor against item

(i) any breach, non-observance or non-performance by the sub-contractor, his servants or agents of the said provisions of the main contract; and

(ii) any act or omission of the sub-contractor his servants or agents which involves the contractor in any liability to the employer under the main contract; and

(iii) any claim, damage, loss or expenditure due to or resulting from any negligence or breach of duty on the part of the sub-contractor his servants or agents (including any wrongful user by him or them of scaffolding referred to in Clause 18 of this sub-contract or other property belonging to or provided by the contractor).

The right of the defendant to claim for losses suffered by it in respect of defective sub-contract works is also reserved under Clause 9(b) of the sub-contract. The right of a main contractor to withhold certain sum to satisfy the main contractor's claim against the sub-contractor is also acknowledged under the common law - see for example *Gilbert-Ash Ltd. v. Modern Engineering* [1973] 3 All ER 195.

In answer to the defendant's contention Ng Mong Eng, the General Manager of the plaintiff affirmed an affidavit on 21 June 1989, (encl. 14) in which he produced a letter dated 15 January 1987, written by the defendant's project manager in which was listed the defective works which the plaintiff had to rectify. And in answer to the defendant's claim for a sum of RM125,029.28 in respect of power consumed by the plaintiff, the answer was that the matter was in no way involved with nor could it be raised in the present action of the plaintiff. At any rate the plaintiff went on to say that the claim in respect of the power consumed by the plaintiff was arbitrarily raised by the defendant in order to avoid liability. To my view the answers given by the plaintiff only go to show that the defendant has succeeded in raising triable issues which cannot be resolved at the O. 14 judgment stage. The issues can only be resolved at the trial of this action. Accordingly I hold that the plaintiff is also not entitled to summary judgment for the sum of RM48,618. The appeal of the defendant is allowed and the order of the SAR dated 7 August 1989, is revoked. The plaintiff is to pay the cost of the proceedings.

Also found at [1992] 1 CLJ 509